

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD v.
LICENSE No. 27439
Issued to: Cecil L. HALL

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2380

Cecil L. HALL

This appeal has been taken in accordance with Title 46 U.S.C.7702 (b) and 46 CFR 5.30-1.

By order dated 10 February 1984, an Administrative Law Judge of the United States Coast Guard at St. Louis, Missouri, suspended Appellant's mariner's license for two months, plus three months on twelve months' probation, upon finding him guilty of negligence. The specification found proved alleges that while serving as Operator on board the M/V LOUIS FRANK, under the authority of the above captioned license, at or about 2330, 25 April 1983, Appellant did cause his tow to allide with the Florence Highway Bridge at Mile 56.0 of the Illinois River.

The hearing was held at St. Louis, Missouri, on 2-3 June 1983. At the hearing, Appellant was represented by professional counsel and entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence two documentary exhibits and the testimony of two witnesses.

In defense, Appellant offered in evidence his own testimony, twenty documentary exhibits, and the testimony of eight additional witnesses.

On 10 February 1984, the Administrative Law Judge rendered a Decision and Order finding that the charge and specification had been proved. The Order suspended Appellant's license for two months, plus three months on twelve months' probation.

The Decision and Order was served on 13 February, 1984. Appeal was timely filed on 22 February and perfected, following an authorized extension, on 23 May 1984.

FINDINGS OF FACT

On 25 April 1983, Appellant was the Operator of the M/V LOUIS FRANK, acting under the authority of his license, as it proceeded down the Illinois River in the vicinity of the Florence Highway

Bridge. The M/V LOUIS FRANK is a 4200 horsepower towboat, 144 feet long and 35 feet wide. The vessel was equipped with the navigational instruments normally utilized to determine whether a towing vessel and its tow are properly aligned to transit a bridge, including radars, a swing meter, flanking lights, and bridge search lights. The M/V LOUIS FRANK was pushing an integrated tow of eight laden tank barges, in a configuration four long and two wide. The tow was 1189 feet long and 108 feet wide.

The Florence Highway Bridge, located at Mile 56 of the Illinois River, is a vertical lift span bridge with a horizontal clearance of 202 feet. The bridge had a protective system consisting of two cylindrical-shaped concrete-filled steel pier protection cells, 26 feet in diameter, located upriver and directly adjacent to the bridge piers. A steel icebreaker was located about 350 feet upriver on the right-descending side. This icebreaker was damaged with only about 18 inches above the water. It had a functioning red light on top. Another icebreaker on the left-descending side of the river about 350 feet upriver had been removed because of allision damage.

On 25 April, the Illinois River was above flood stage, with a current of 5-6 miles per hour. In a bend located about one mile upstream from the bridge, the current drafts from the right-descending bank toward the left-descending bank. In the vicinity of the bridge the current cross-drafts, creating a set from left to right.

After Appellant steered through the bend, he lines up his tow about 15 feet to the left of the center of the bridge, anticipating a right-hand set. Had he maintained this approach he would have had approximately thirty-two feet of clearance between the tow and the left protective cell. By the time the head of the tow reached the left-descending protective cell, however, only 6-8 feet of clearance remained between the tow and the cell. Appellant testified that he experienced an unexpected left-hand draft just above the protective cell. He attempted to steer to the right, to no avail. He then attempted to straighten the tow in an effort to slide against the protective cell and clear the bridge. The port lead barge allided with the cell approximately 240 feet aft of the head of the tow. The allision damaged the bridge, preventing closure. It also caused the tow to break up, resulting in an oil spill.

BASES OF APPEAL

This appeal has been taken from the order of the Administrative Law Judge. It is urged that:

1. Numerous factual findings of the Administrative Law Judge are erroneous;
2. The Administrative Law Judge improperly applied a presumption of negligence arising out of the allision; and
3. The presumption of negligence was rebutted.

APPEARANCE; Christopher A. Helms, Esq., of Leach and Paysse, New Orleans, Louisiana.

OPINION

I

Appellant argues that numerous factual findings of the Administrative Law Judge are incorrect. I do not agree. The findings of an Administrative Law Judge will be overturned on appeal only if they are arbitrary and capricious. Appeal Decision No. 2217 (QUINN). Moreover, to the extent that the findings are based upon a resolution of conflict between the testimony of witnesses, such resolution is uniquely the province of the Administrative Law Judge, and will not be overturned unless the testimony upon which the findings are based is inherently incredible. Appeal Decision No. 2363 (MANN). Upon review of the record, I find that the relevant findings are amply supported, and are neither arbitrary nor capricious. Therefore, those findings will not be overturned.

II

Appellant asserts that the Administrative Law Judge erred in applying a presumption of negligence arising from the allision. I do not agree.

It is well settled that a rebuttable presumption of negligence arises when a moving vessel strikes a fixed object. The Oregon, 158 U.S. 186, 193 (1894); Brown & Root Marine Operators v. Zapata Offshore Co., 377 F.2d 724 (5th Cir. 1967); Appeal Decision No. 2284 (BRAHN). This presumption creates a prima facie case of negligence which, if not adequately rebutted, is sufficient to permit the Administrative Law Judge to conclude that the charge of negligence is proved.

Appellant argues, however, that bridges over navigable waterways are presumed to be obstructions to navigation. Therefore, when a vessel strikes a bridge, a condition precedent to the application of the presumption of negligence is proof that the

bridge was in compliance with its permit. Appellant contends that because the protective cells required by the permit were not properly maintained, the presumption of negligence against the vessel was inapplicable.

Once the fact of allision between a fixed object and a vessel is established, the burden of going forward with sufficient evidence to rebut the presumption shifts to the respondent. Appeal Decision No. 2284 (BRAHN). The respondent may offer proof of non-compliance with the permit in rebuttal to attempt to meet his burden to establish that the bridge solely was at fault for the allision. Proof of compliance with the permit, however, is not a condition precedent to application of the presumption of negligence against the vessel. see Southern Pacific Transp. Co. v. Tug Capt. Vic, 443 F. Supp 722 (E.D. LA. 1977).

III

Appellant argues that even if the presumption of negligence was properly applied by the Administrative Law Judge, it was adequately rebutted by proof of the bridge's non-compliance with its permit and by evidence showing that he exercised due care. I do not agree.

The burden of rebuttal on the Appellant is a heavy one. As was stated in Appeal Decision No. 2284 (BRAHN):

[t]he inference of negligence established by the fact of allision is strong and requires the operator of the moving vessel to go forward and produce more than just cursory evidence on the presumptive matter. In order for the respondent to gain a favorable decision after the presumption is properly established, it must be shown that the moving vessel was without fault, the allision was occasioned by the fault of the stationary object, or the result of inevitable accident.

Appellant first argues that the presumption was adequately rebutted by proof that the bridge was at fault. Specifically, he argues that the bridge's failure to comply with its permit made the bridge presumptively negligent under the doctrine enunciated by the Supreme Court in The Pennsylvania, 86 U.S. (19 Wall.) 125 (1874). Under the Pennsylvania Rule, the violator of a statutory rule intended to prevent allisions has the burden of proving not only that its violation was not a contributing cause of the allision, but that it could not have been a cause of the allision. 86 U.S. at 138.

The Pennsylvania Rule consistently has been applied where a

bridge is in violation of its permit. See, e.g., Florida East Coast Railway Co. v. Revilo Corp., 637 F.2d 1060 (5th Cir. 1981); Complaint of Tug Helen B. Moran, Inc., 560 F.2d 527 (2nd Cir., 1977); Feeder Line Towing Serv. v. Toledo, Peoria & Western Railroad Co., 539 F.2d 1107 (7th Cir. 1976). The effect of the Rule is to establish a presumption of negligence against the bridge. This presumption does not, however, negate the presumption of negligence against the vessel arising from the fact of allision. See Southern Pacific Transp. Co. v. Tug Capt. Vic, 443 F. Supp. 722 (E.D. La. 1977).

In a civil suit for damages, the result of the failure of the bridge and vessel to rebut the respective presumptions would require a court to allocate liability between them based upon their proportional degree of fault. Id. In a Cost Guard suspension and revocation proceeding, the only issue is the negligence of the person charged. Contributory negligence of others is not a defense. Appeal Decisions No. 2175 (RIVERA), 2096 (TAYLOR and WOODS), and 1670 (MILLER). To prevail, Appellant must show that the sole fault of the allision rests with the bridge. The application of the Pennsylvania Rule against the bridge, without more, fails to satisfy this burden.

Appellant also argues that the presumption of negligence was adequately rebutted by a showing that he exercised reasonable care. He contends that his approach to the bridge was performed in the manner of a reasonably prudent operator, and that he was forced to the left-descending side of the channel by an unforeseeable draft. This argument, however, is not supported by the evidence.

As operator of a towboat, Appellant is charged with knowledge of the currents and river conditions in the area to be transited, and is obligated to take the necessary measures to counteract the effects of such currents on his tow. Davidson Steamship Co. v. United States, 205 U.S. 187, 194 (1907); universe Tankships v. The Munger T. Ball, 157 F. Supp. 237, 239 (S.D. Ala. 1957); Appeal Decisions Nos. 2370 (LEWIS), 2367 (SPENCER), AND 2284 (BRAHN). Unless the conditions were such that they "could not have been foreseen by the exercise of the kind of judgment which good seamanship requires, the burden of disproving negligence has not been met." Patterson Oil Terminals, Inc. v. The Port Covington, 109 F. Supp. 953, 955 (E.D. Pa. 1952), aff'd, 208 F.2d 694 (3rd Cir. 1953). See also Appeal Decision No. 2366 (MONAGHAN).

Approximately one mile above the Florence Highway Bridge, the Illinois River bends to the right. Throughout this bend and the subsequent approach to the bridge, there is a set to the left. The evidence at the hearing showed that the existence of this draft

was, or should have been, known to Appellant. After steering through the bend, Appellant lined up his tow 15 feet to the left of the center of the bridge, anticipating a right-hand set in the vicinity of the bridge. Had Appellant made good his intended approach, he would have had thirty-two feet of clearance between the tow and the left protective cell. By the time he reached the cell, however, his clearance was only six feet. Appellant apparently misjudged the strength of the draft. Despite the possession of sophisticated navigational equipment on board to determine the position of the tow, Appellant did not realize that his tow had been set to the left until the head of the tow was abreast of the protective cell. By that time, his efforts at corrective measures were too late.

The left-hand set on the bridge approach simply was not unforeseeable. As Appellant pointed out at the hearing, the left descending icebreaker, located approximately 350 feet above the bridge, had been removed because of extensive allision damage. The evidence also shows at least four reported allisions with the left protective cell caused by a left-hand set, which is exacerbated when the river is high.

Thus, the Administrative Law Judge did no err in finding that Appellant failed to show that the conditions that caused the allision were unforeseeable and could not have been prevented through the exercise of reasonable care. The presumption of negligence remains unrebutted.

CONCLUSION

There is a substantial evidence of a reliable and probative nature to support the findings of the Administrative Law Judge. The hearing was conducted in accordance with applicable regulations.

ORDER

The order of the Administrative Law Judge dated at St. Louis, Missouri, on 10 February 1984 is AFFIRMED.

B.L. STABILE
Vice Admiral, U.S. Coast Guard
VICE COMMANDANT

Signed at Washington, D.C. this 8th day of February, 1985